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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-57

EDWIN L. WIEGAND CORPORATION,

Petitioner,

—v.—

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner, Edwin L. Wiegand Corporation, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit.

Opinions of Courts Below

1. The opinion of the District Court in the principal case is attached hereto as Appendix A.

2. The opinion of the District Court on the cross-claims is attached hereto as Appendix B.

3. The opinion of the Sixth Circuit is attached hereto as Appendix C.

Grounds on Which Jurisdiction Is Invoked

1. Summary judgment on Respondent's cross-claim against Petitioner in the District Court was entered on August 4, 1970.

2. The order denying Petitioner's motion for new trial on its cross-claim in the District Court was entered August 21, 1970.

3. The order and judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 12, 1971.

4. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

Question Presented for Review

In a product liability case in law and not in equity where:

1. The two defendants cross-claimed against each other; and

2. The facts as to liability to plaintiff and liability between the defendants *inter se* were admittedly in dispute; and

3. One of the defendants timely demanded a jury trial on the cross-claims, prior to trial of the principal case, and noted its jury demand on the record at the commencement of the trial of the principal case; and

4. Where the trial court at the last minute decided to try the principal case and the cross-claims separately; and

5. Upon trial of the principal case without a jury, the trial court, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, made detailed findings of fact adverse to petitioner,

could the trial court notwithstanding the jury demand and admitted factual disputes as to the cross-claims, subsequently grant summary judgment on one of the cross-claims on the ground that the cross-claimants are conclusively bound by the court's fact findings in the principal trial and thereby estopped from further litigation?

Constitutional and Rules Provisions Involved

1. The Seventh Amendment to the United States Constitution preserving the right to trial by jury reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law."

2. Rule 38(a) of the Federal Rules of Civil Procedure preserving the right to trial by jury reads as follows:

> "*Right Preserved.* The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

3. Rule 38(b) of the Federal Rules of Civil Procedure setting forth procedure for demanding a jury reads as follows:

"*Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party."

4. Rule 42(b) of the Federal Rules of Civil Procedure permitting separate trials of the cross-claims reads as follows:

"*Separate Trials.* The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claims, counterclaim, or third-party claim, or of any separate issue of or any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States."

5. Rule 52(a) of the Federal Rules of Civil Procedure requiring a trial court sitting without a jury to make detailed findings of fact reads as follows:

"*Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous,

and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

Statement of the Case

This action arose out of a fire which started in or about a certain heater-air conditioning unit manufactured by Respondent, Westinghouse Electric Corportion ("WESTINGHOUSE"). Petitioner, Edwin L. Wiegand Corporation ("WIEGAND"), manufactured the heating element which was a component part of the subject WESTINGHOUSE heater-air conditioner unit.

Plaintiffs before the trial court were insurers who were the subrogees of the tenant and owners of the premises damaged by the fire.

Federal jursidiction was based on diversity of citizenship.

Plaintiffs sued WESTINGHOUSE and WIEGAND, jointly and severally, seeking recovery for the stipulated $247,276.33 total damages sustained as a result of the fire on two counts: for breach of warranty and for negligence. The complaint and amended complaint allege that the heater-air conditioning unit was defective, and the proximate cause of the fire.

WESTINGHOUSE cross-claimed against WIEGAND for indemnity and/or contribution, claiming that any liability of WESTINGHOUSE was caused by defective manufacture of the heating element supplied by WIEGAND and installed by WESTINGHOUSE as a component part.

WIEGAND cross-claimed back against WESTINGHOUSE for indemnity and/or contribution, claiming that WESTINGHOUSE was guilty of negligent design and repair of the subject heater-air conditioning unit.

WIEGAND filed a timely demand for jury trial on both cross-claims.

There was no jury demand for trial of the principal case against both WESTINGHOUSE and WIEGAND, jointly and severally.

At the beginning of the trial, counsel for WIEGAND indicated that WIEGAND had demanded a jury trial on the cross-claims. The trial court decided to dispose of the matter in two stages:

1. Try the principal case, the claim of the insurers of the tenant and owners, without a jury; and then

2. Deal with the cross-claims of WESTINGHOUSE and WIEGAND. (Colloquy between counsel, App. D.)

In a lengthy trial, factual and opinion testimony was inconsistent and conflicting. Both:

1. The trial court, in its findings of fact (App. A), and

2. WESTINGHOUSE, in its brief to the Sixth Circuit expressly acknowledged that a finder of fact could properly find either way on the cross-claims between WESTINGHOUSE and WIEGAND.

The trial court found that a defective weld in the WIEGAND heating element caused an electrical arcing of intense heat which ignited a filter and caused the fire (App. A). The trial court determined that both WESTINGHOUSE and WIEGAND were liable to Plaintiffs, jointly and severally, under Michigan law with WESTINGHOUSE liable on an implied warranty regardless of negligence, and WIEGAND liable on their implied warranty and because its negligence was the primary cause of the fire (App. A).

After judgment for Plaintiffs were entered against both defendants, WESTINGHOUSE paid the entire judgment amount to Plaintiffs which filed Satisfactions of Judgments and Assignments to WESTINGHOUSE of their cause of action against WIEGAND.

The trial court granted WESTINGHOUSE's motion for summary judgment against WIEGAND on its cross-claims, and denied WIEGAND's motion for a new trial. The trial court concluded that WIEGAND was not entitled to a jury trial on the cross-claims because the court's findings of facts in the principal case were conclusively binding on WIEGAND (App. B).

The Sixth Circuit Court of Appeals erroneously failed even to address itself to the issues involved issuing only a pro forma order of affirmance, without opinion (App. C).

Why Certiorari Should Be Granted

I.

The decision of the Sixth Circuit directly conflicts with decisions of this Court.

The following cases (1) were heard on certiorari and (2) reversed decisions of the Court of Appeals:

A. In *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500, the trial court determined to try the equitable issue submitted by plaintiff (prayer for injunction) first, even if this would necessarily dispose of defendant's legal claim and, by *res judicata,* eliminate the jury trial defendant had demanded on its counterclaim.

This Court held, Justices Harlan and Whittaker dissenting, that equitable claims could not be tried in advance of legal claims so as to deprive a party of its right to trial by jury. The court noted that, 359 U.S. 510-11,

> ". . . only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."

B. In *Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469, the trial court determined that the legal issue of anti-trust violations was "incidental" to equitable aspects of the case (accounting sought by plaintiff) and dismissed defendant's jury demand. This Court, following and further defining *Beacon Theatres,* upheld defendant's right to a jury trial on the

legal issue of the claimed anti-trust violation. The Court said, 369 U.S. 470,

> "We granted certiorari because the action of the Court of Appeals seemed inconsistent with protections already clearly recognized for the important constitutional right to trial by jury in our previous decisions."

And in a footnote, 369 U.S. 473,

> ". . . As long as any legal cause is involved the jury rights it creates control. This is the teaching of *Beacon Theatres,* as we construe it." *Thermo-Stitch, Inc.* v. *Chemi-Cord Processing Corp.* (CA 5 Fla.), 294 F.2d 486, 491.

The mandate of *Dairy Queen* should be clearly dispositive of the case at bar, 369 U.S. 473,

> "*Beacon Theatres* requires that *any* legal issues for which a trial by jury is timely and properly demanded be submitted to a jury." (Emphasis supplied.)

The issues of the cross-claims in the case before this Court (negligence and breach of warranty) are strictly legal in character. There is no complication of equitable, non-jury issues as there was in *Dairy Queen* and *Beacon Theatres.* WIEGAND timely demanded a jury when it answered WESTINGHOUSE's cross-claim and filed its own cross-claim prior to trial of the principal case.

C. *Ross* v. *Bernhard,* 396 U.S. 531, was a stockholders' derivative suit against directors of a corporation in which plaintiffs held stock. The Second Circuit would not permit

a jury trial because derivative actions were equitable in nature. This Court held that, 396 U.S. 532-3,

> ". . . the right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury."

and at 396 U.S. 537-38,

> ". . . where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims."

In entering summary judgment for WESTINGHOUSE on the cross-claims, the trial court acted on its findings in the principal case. Despite the clear prohibition of *Ross* the trial court deprived WIEGAND of a jury trial because of a "court trial of a common issue." The Court of Appeals erroneously did not even consider this issue.

D. This Court has summarily reversed cases wherein *Beacon Theatres* and *Dairy Queen* have not been followed:

1. *Meeker* v. *Ambassador Oil Co.*, 375 U.S. 160.
2. *Shubin* v. *United States District Court*, 369 U.S. 660.

II.

The issue presented here is of first impression.

On July 1, 1966, Rule 42(b) of the Federal Rules of Civil Procedure was amended to add the following italicized language:

> "(b) *Separate Trials.* The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, *always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.*"

Under Rule 42 a trial court can properly resolve cross-claims of co-defendants *inter se* after it resolves the principal dispute against the Defendants. Under Rule 38 a cross-claimant can demand a jury on the cross-claims at any time prior to trial. Under Rule 52(a) the trial judge is required to submit detailed findings of fact.

Since Rule 42(b) was amended, this Court has not yet determined whether in a case with the defendants cross-claiming against each other, where (1) no jury has been demanded in the principal case but has been demanded on the cross-claims, and (2) the facts are admittedly in dispute, both as to liability to plaintiff, and as to liability between defendants *inter se*, the trial court can make such findings as would not only resolve but also foreclose any

subsequent trial by jury on the cross-claims, by summary judgment because the parties would be "estopped" from again contesting those facts.[1]

III.

The decision of the Sixth Circuit results in uncertainty as to whether litigants could lose their right to a jury trial because of the latitude of Rule 42(b) and the requirements of Rule 52(a).

Rule 42(b) gives a trial judge wide discretion to try issues or claims separately. Rule 52(a) requires the trial court to submit detailed findings of fact. If the trial judge determines to try a principal case separately, prior to trying cross-claims, are the cross-claimants then bound by the trial court's findings of fact despite that they have timely demanded a jury trial of the cross-claims on admittedly disputed facts?

If the answer is yes, then what happens to the litigant's right to trial by jury of disputed facts on its cross-claim pursuant to the jury demand properly filed prior to the first trial?

If the answer is yes, how is such result reconciled with the Seventh Amendment and with Rule 42(b) which expressly was amended to further safeguard the constitutional right to a jury trial?

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[1] The trial court said,

"Defendant, WIEGAND, is bound by the findings of fact made on the issues already decided and will be estopped from any attempt to relitigate these issues which were necessarily raised at trial." See Appendix B.

There is great confusion as to the permissible discretion of the trial court in such circumstances. What *should* the trial court do? Petitioner submits that, by way of illustration only and not by limitation, the trial court could properly do one of two things:

1. Empanel a jury for the cross-claims only. Try the principal case and the cross-claims together. Instruct the jury to return a verdict on the cross-claim *only* if the trial court has found liability to the plaintiffs.

2. Try the principal case first. Upon finding any liability to plaintiffs for breach of warranty, then provide that further disposition as to liability between defendants on the cross-claims be determined by the jury as demanded by either of the cross-claimants.

IV.

The right to trial by jury is fundamental to our system of justice.

On previous occasions this Court has said that,

> "We granted certiorari, . . . because maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick* v. *Schiedt*, 293 U.S. 474, 486, 79 L.Ed. 603, 611, 55 Sup. Ct. 296, 95 ALR 1150, 36 NCCA 184."

Respectfully submitted,

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